Employees Provident Fund Ordinance nor "States of the Federation" in the Interpretation and General Clauses Ordinance were amended to fit in the new changes. However, Part IV of the Malaysia Act is embedded in the Constitution and the proviso of section 73(1) of the Act enacts "that references to the Federation shall be construed as references to Malaysia, and expressions importing such a reference shall be construed accordingly". It therefore follows that reference to "States of the Federation" would now bear reference to "States of Malaysia and Singapore", and with the secession of Singapore it would now mean "States of Malaysia". That is my interpretation of "Malaya" in the Employees Provident Fund Ordinance as defined by the Interpretation and General Clauses Ordinance having regard to the proviso of section 73(1) of the Malaysia Act. That, to my mind, is not inconsistent with the provisions of article 1(2) of the Constitution which declares "States of the Federation" as the eleven States of Malaya and the two States of Borneo. As a matter of deduction, section 13(1)(d) of the Employees Provident Fund Ordinance, which derives its definition of "Malaya" from the Interpretation and General Clauses Ordinance, is not inconsistent with any provision of the Constitution. If the result appears grotesque, that is not a reason why the law should not be enforced, but it may be a reason why the law should be altered.

I would therefore dismiss the application with costs.

Application dismissed.

Solicitors: *A. Nahappan & Co.; Shook Lin & Bok.*

LIM TRADING CO. v. SINCLAIR

[O.C.J. (Buttrose J.) April 21, 1967]

[Singapore — Suit No. 1316 of 1965]

Insurance — Indemnity for loss of shares by theft — Obtaining shares by false pretences — Whether "theft" within the meaning of policy.

The plaintiffs were a firm of share and stockbrokers. A fraudulent customer of theirs bought shares to the value of $69,346.52 and issued cheques in payment for the shares. The cheques were dishonoured and the customer had disposed of the shares and made off with the proceeds. The plaintiffs brought this action to recover the sum of $69,346.52 from the defendant, a Lloyd's underwriter, by way of indemnity, under a policy of insurance covering amongst other perils, loss of the shares by theft. The short and only point for decision in the case was whether the facts constituted a theft within the meaning of the policy. The defendant contended that theft and the other perils insured against involved the removal of the shares without the consent of the stockbrokers and the facts of the case indicated obtaining the shares by false pretences and not theft.

Held: in essence the transaction was one of obtaining the shares by false pretences and not by theft within the meaning of the policy. Under English law it would be regarded and punished as false pretences and under Singapore law as cheating and in neither case as theft within the meaning of the policy or in the fullest sense of the term itself and therefore the plaintiffs' claim must be dismissed with costs.

Cases referred to:—

(1) *Lake* v. *Simmons* [1927] A.C. 487, 509.

(2) *Pawle & Co.* v. *Bussell* (1916), 85 L.J. K.B. 1191.

(3) *Lake* v. *Simmons* [1926] 1 K.B. 366, 375.

(4) *Eisinger* v. *General Accident Fire & Life Assurance Corporation Ltd.* [1955] 2 All E.R. 897.

(5) *R.* v. *Stewart* (1845), 1 Cox C.C. 174.

CIVIL SUIT.

L. A. J. Smith for the plaintiffs.

A. P. Godwin for the defendant.

Cur. Adv. Vult.

Buttrose J.: In this action the plaintiffs, a firm of stock and share brokers, claimed the sum of $69,346.52 from the defendant, a Lloyd's underwriter, for a loss under an insurance policy covering amongst other perils, loss by theft.

The facts were that one Lim Pow Tian a customer of the plaintiffs came to their office and bought shares to a total value of $69,346.52. He issued three cheques in payment for the shares which he gave to the plaintiffs who in turn issued receipts therefor and handed him the shares. The cheques were dishonoured and it was subsequently discovered that Lim Pow Tian had disposed of the shares and disappeared with the proceeds and the police have been unable to trace him. It was admitted that he had no funds in the bank to meet these three cheques.

On these facts the plaintiffs, by virtue of an amendment to their statement of claim which I allowed at the trial, claimed to be indemnified under the policy for loss sustained by theft by one Lim Pow Tian a customer of the plaintiff firm and the short and only point for decision in so far as the plaintiffs' case was concerned was did the facts constitute a theft within the meaning of the policy.

The policy was the usual Lloyd's in and out stockbrokers policy effecting insurance against the loss or deprivation of the various securities listed therein which included shares. In so far as is material to the present case the six perils insured against were loss by robbery, theft, fire, explosion, burglary or abstraction whether by officers, clerks or servants of the assured, or by any other person or persons or contributed to by the negligent or fraudulent conduct of the said officers, clerks or servants or other person or persons.

It was contended on behalf of the defendant that the plaintiffs were swindled by their customer who under English law would be guilty of obtaining the shares by false pretences and under the Singapore Penal Code (Cap. 119) of

cheating the plaintiffs out of their shares. It was submitted that such a transaction was not within the six perils enumerated in the policy and certainly did not amount to theft within the meaning of the policy as contended for by the plaintiffs.

My first instinct was to say that I do not think that anyone would quarrel with this statement as being a correct interpretation of the law as applied to the facts of this case but it was urged upon me that in a policy of insurance the words expressing the risk covered are not always used in the strict technical sense which they bear in relation to a criminal offence. They may be interpreted according to their context in a more popular sense or they may be expressly defined in some less technical sense by the policy itself; that this was a commercial contract between the underwriters and the assured, and to ascertain its meaning the first thing to do is to examine the nature of the document without regard to the niceties of the criminal law.

Lord Sumner however in *Lake* v. *Simmons* [1] dissents from the view that the criminal law should be treated as irrelevant merely because the document is commercial for after all, as he points out, criminal law is still the law and so are its definitions and rules.

Were it not for the case of *Pawle & Co.* v. *Bussell* [2] to which I was referred by Mr. Smith I should have entertained little doubt that the sale of the shares by the plaintiffs to Lim Pow Tian in exchange for the cheques which were subsequently dishonoured did not constitute a theft within the meaning of the policy.

In that case the plaintiffs, a firm of stockbrokers, insured share certificates against loss by theft or by being taken out of their possession or control by any fraudulent means. *P.*, a customer of the plaintiffs, in taking delivery of certain share certificates, induced the plaintiffs' manager to accept a post-dated cheque in payment by the false statement that the head of the firm had consented to give him credit in this particular transaction. The cheque was dishonoured and the following day *P.'s* dead body was found in the sea. He was insolvent and sold the shares for cash. It was held that the certificates had been stolen by *P.* and had been taken out of the plaintiffs' possession or control by fraudulent means within the meaning of the policy, and that the plaintiffs were entitled to recover.

At page 1192 Bailhache J. deals with the matter in this way:—

'The plaintiffs contended that these facts constitute a theft, or, if not a theft, shew that the certificates were, within the meaning of the policy, taken out of their possession and control by fraudulent means, and, further, taken out of their possession or control through the negligence of their servant, the manager. The strongest way of putting the case for the defendants is to say that this is not a policy to secure the plaintiffs from being cheated by their customers. But I think that is putting it on too broad lines. One has to see what the precise kind of cheating was. Philps first told the plaintiffs' manager a lie, and then handed him a post-dated cheque. I have come to the conclusion that when Philps handed over that cheques he well knew that it would not be honoured and was worthless, and, therefore, that he got these securities out of the plaintiffs' hands by false representations made to their agent; and I think that in common parlance, as well as in legal phraseology, Philps' act would be called a theft. I think that any business man would say that Philps stole the certificates, and that what was done is covered by the words in the policy, "lost . . . by . . . theft . . . or taken out of their possession or control by any fraudulent means".'

That the securities were taken out of the plaintiffs' possession and control by fraudulent means there can be no doubt and from that point of view the decision of Bailhache J. was right and can be supported. Whether he was right in saying that in common parlance as well as in legal phraseology Philps' act would be called a theft and that any business man would say that Philps stole the certificates is a more difficult matter to determine and one on which I entertain considerable doubt.

Mr. Godwin for the defendant submitted that in saying what he did Bailhache J. went too far and that the facts in that case and the present one did not amount to theft either in common parlance or legal phraseology. It was argued that theft and the other perils insured against involved the removal of the securities without the consent of the stockbrokers. In other words the defendant asserted that the facts showed false pretences only while the plaintiffs asserted that here there was larceny or theft.

That there is a distinction between larceny by a trick and false pretences has always been recognised although in some cases, it is true, the one so nearly resembles the other as to create some difficulty in distinguishing them upon principle.

In *Lake* v. *Simmons* [3] McCardie J. (the judge of first instance) puts the matter in this way:—

"In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud."

The distinction between larceny by a trick and obtaining money or other thing by false pretences depends therefore on the question whether when the physical possession was handed over, there was not an intention to pass the property.

In the present case the plaintiffs, in the view I take, intended to and did pass the entire property in the securities to their customer. The transaction was a sale of the shares in question by the plaintiff firm to their customer who paid for them by three cheques which turned out to

be worthless and were dishonoured on presentation. I think this is the proper and correct view of this transaction.

All the plaintiffs did, to use the not inapt phrase of Mr. Godwin's, was to make a mistake as to their customer's credit worthiness.

In essence the transaction was, in my opinion, one of obtaining the shares by false pretences and not by theft within the meaning of the policy. Under English law it would be regarded and punished as false pretences and under Singapore law as cheating and in neither case as theft either within the meaning of the policy or in the fullest sense of the term itself.

Furthermore in considering whether this was a theft within the meaning of the policy it is to be observed that in addition to the six perils insured against to which I have already alluded there is a further provision in the policy insuring against "any other loss whatsoever through the theft, fraud, larceny or other dishonesty of or forgery by any officer, clerk or servant of the assured". This provision is limited to the assured's officials and employees and does not extend to other persons.

The inclusion of the words 'fraud' and 'other dishonesty' in a later part of the policy would seem to indicate that they were never intended to be included in the word 'theft' when used in the earlier part of the policy where the other six perils insured against are specified and that their omission was deliberate and intentional. It would have been a simple matter to have included them along with the six perils already enumerated or to have added to them the words "or by being taken out of their possession or control by any fraudulent means" as was the case in *Pawle & Co.* v. *Bussell, supra,* if that had been the intention.

It was also argued by Mr. Godwin that even if it was held that this transaction amounted to a loss by theft within the meaning of the policy it was not in respect of a loss of a security covered by the policy as the plaintiffs were merely deprived of the proceeds of the cheques. In support of this proposition he cited *Eisinger* v. *General Accident Fire and Life Assurance Corporation Limited.*[4] Whether the underwriters would wish to take advantage of this technical point in the event of it being held to be sound is a matter on which I do not propose to speculate. Suffice it to say that in view of the conclusion at which I have arrived on the major issue in this case it is unnecessary nor do I propose to deal with it.

Finally Mr. Smith at the close of the case in his final reply referred me to a passage in the *English and Empire Digest Replacement* Volume 15 p. 1043 para. 10,270 under the heading "By giving valueless cheque" where the case of *R.* v. *Stewart* [5] was referred to. Curiously enough that case was also cited in argument on behalf of the plaintiffs before Bailhache, J. in *Pawle & Co.* v. *Bussell, supra,* in support of the proposition that the facts in that case, to which I have already referred, disclosed larceny by a trick. The decision in *R.* v. *Stewart* was that where goods ordered by a party to be sent to a particular place are so sent by a servant, with specific instructions from the owner not to part with them without the price, and the servant is induced by the buyer to receive a valueless cheque as payment, the case is one of larceny. That is not the case here. Admittedly there was a general rule in the office of the plaintiff firm that securities should not be handed over to customers unless paid for in cash or by a bank cheque or unless the cheque had first been cleared. But that rule was a flexible one and in any event it had no application to a known and good customer into which category Lim Pow Tian undoubtedly came. The evidence was that he had previously had substantial dealings with the plaintiff firm amounting to some $60,000 odd or more all of which had been satisfactory. In the case of such a customer his cheques would be accepted and this I have no doubt was in accord with the usual practice of stockbroking firms.

In the result therefore for the reasons which I have indicated the plaintiffs' claim fails. There will be judgment for the defendant and the plaintiffs' claim must be dismissed with costs.

Claim dismissed.

Solicitors: *L. A. J. Smith; Donaldson & Burkinshaw.*

LEE SEM YOONG v. LEONG YOONG

[O.C.J. (Gill J.) April 28, 1967]

[K.L. — Civil Suit No. 1189 of 1964]

Landlord and Tenant — Licensee — Termination of — Ejectment — Trespass — Damages.

Practice and Procedure — Res judicata — Same parties — Matter in issue never finally decided by previous court.

In this action the plaintiff sought to eject the defendant from the premises in question and to recover damages for trespass. The plaintiff contended that the defendant occupied the said premises as a licensee at all material times and that, such licence having been determined by a written notice on July 24, 1964, requiring him to vacate the said premises on or before August 31, 1964, he had remained on the land as a trespasser. The learned judge found as a fact that the defendant paid no rent and that the temporary buildings on the land were erected after September 1952.

Held: on the facts, the defendant occupied the land as a licensee. His licence having been duly determined by a written notice, he continued to stay on the land as a trespasser, therefore the plaintiff was entitled to damages.

For the doctrine of *res judicata* to apply, a defendant has to show that there was a former suit between